

90-5635

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

AUGUST TERM, 1990

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JOHN J. McCARTHY #38051-066  
State No; 14163  
UNITED STATES PENITENTIARY  
P.O. BOX 1000  
LEAVENWORTH KANSAS., 66048-1000

[PETITIONER]

-v-

GEORGE BRONSON, ET AL.  
DEPARTMENT OF CORRECTIONS  
340 CAPITOL AVE  
HARTFORD, CONNECTICUT., 06106

[RESPONDENT]

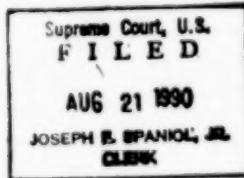
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PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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JOHN J. McCARTHY PRO SE  
P.O. BOX 1000  
LEAVENWORTH KANSAS, 66048

QUESTIONS PRESENTED FOR REVIEW

1. Is a prisoners law suit "trial" pursuant to 42 U.S.C. 1983 a "petition challenging conditions of confinement" and within the meaning of 28 U.S.C. 636 (b) (1) (B).
2. Is 28 U.S.C. 636 (b) (1) and (c) (2) vague and indefenite because it fails to describe precisely what specifically is a petition challenging conditions of confinement. Or because it fails to specifically outline what constitutes persuade or induce as outlined in 636 (c) (2) and if administration of the consent procedure itself constitutes action pursuant to the above.
3. Is the petitioner entitled to have the claim of the Magistrate. violating the "Blind Consent" provisions of 636 (c) (2) mentioned and decided by the Court of Appeals when he raised the issue significantly in his appeal briefs.
4. Was the petitioner entitled to a Jury Trial or Trial before the District Court Judge.
5. Was the Magistrate without jurisdiction because of the procedural posture of the case.
6. Did the petitioners second amended complaint raise new issues significantly for the purpose of Federal Rules of Civil Procedure Rule 38.
7. Did the petitioner waive his right to a Jury Trial in 1985.
8. Was the petitioner entitled to free transcripts when objecting to the Magistrates findings and conclusions as being clearly erroneous.

IN THE SUPREME COURT  
OF THE UNITED STATES  
AUGUST TERM: 1990  
No; \_\_\_\_\_

JOHN J. McCARTHY #38051-066  
STATE NO: 14163

[PETITIONER]

v.  
GEORGE BRONSON, ET AL.

[RESPONDENT]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner John J. McCarthy #38051-066 (state no; 14163) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered and dated/ June 22, 1990

OPINION BELOW

The Court of Appeals entered the Opinion Affirming the District Courts action/Judgment in a suit brought under 42 U.S.C. 1983 (1982) alleging unlawfull removal of the plaintiff/petitioner from his prison cell and use of excessive force.

A copy of the decision is attached as Appendix A.

JURISDICTION

The Jurisdiction of this Court is invoked under Title 28 United States Code Section 1254 (1).1/  
Note; 1/ No other petitioner is involved in this petition.

CONSTITUTIONAL PROVISIONS

SEVENTH AMENDMENT

EIGHTH AMENDMENT

FOURTEENTH AMENDMENT

STATEMENT OF THE CASE

This is a pro se appeal by a state prisoner John J. McCarthy from a June 19/1990 judgment of the district court (Jose A. Cabranes, Judge) in favor of the defendant's state prison officials. McCarthy sued under 42 U.S.C. 1983 (1982) alleging unlawfull removal from his cell and use of excessive force. The judgement was entered after a hearing conducted by Magistrate F. Owen Eagan. The case was complicated by some uncertainty as to the authority of the Magistrate in recommending proposed findings to the District Judge and the authority of the District Judge in approving those recomended findings. The appeal challenged procedural irregularities concerning the reference to the Magistrate, the lack of a Jury trial, the denial of free copy of hearing transcript, and the merits of the fact finding.(see; Appendix A at page4560)

One significant issue the Court of Appeals failed to address was the petitioner/appellants claim that the Magistrate violated the blind consent provisions of 28 U.S.C. 636 (c) (1) and Federal Rules of Civil Procedure Rules 53 (b) and 73 (b) as well as Local Rules 4 (A) (2) when he administered application of the consent form on two occasions. (see; Appendix A at pages; 4562,4563,) This issue was raised in the appellants initial Brief designated as Statement of Issue III. (see; Appendix B. at page ii at III.) It was again raised in the appellants reply brief.(see; Appendix C. at page 1. at 1.)

The Court of appeals failed to make comment or address the issue and the appellant petitioned for a rehearing.

REASONS FOR GRANTING THE WRIT

a. It appears that 28 U.S.C. 636 (b) (1) (A) (B) is vague and indefenite and there is controversy in the Circuits regarding its application. The Court of appeals framed the petitioners law-suit as being a "petition challenging the conditions of confinement" within the meaning of of section 636 (b) (1) (B) but apparently there is no legislative history significantly substantiating this. (see; Appendix A. at page 4565, 4566, citing split in the Circuits)

This substancial question should be settled by this Court.

b. 28 U.S.C. 636 (c) (2) explains the mechanism for application of the consent procedures. The petitioner raised in his appeal briefs that the Magistrate violated the "blind consent provis-ions" therefor was entitled to a new trial. The Court of appeals failed to comment. In light of the above the petitioner claims that;

1. He is entitled to have his claim addressed and that for the appellate court to egnore this violates due process.

2. That the Magistrate violated the Bind Consent pro-visions of 636 (c) (2) and in so doing;

a. Tainted his ability to be impartial and exposed the petitioners trial to prejudice fact finding.

b. Denied the petitioner due process.

c. Violated federal law and statute therefor was with-out Jurisdiction pursuant to 636 et seq.

c. The petitioner was entitled to a Jury Trial or a Trial before the District Court Judge because;

a. The Magistrates violated 636 (c) (2) therefor

the petitioner could not be held to the 1985 waiver when he consented to trial with the Magistrate in open Court. (see; Appendix A. at page; 4569)

b. The petitioners second amended complaint raised new issues significant for the purpose of Federal Rules of Civil Procedure Rule 38.

c. The petitioner never waived his right to a Jury Trial in consenting in 1985 to trial with the Magistrate in that the Magistrate never asked the petitioner if he in fact desired to seek a Jury Trial nor did he inform him that he could not revive a request for a jury trial subsequent to the consent.<sup>1/</sup>

d. Up until March 24/1988 when trial commenced the Magistrate was acting under Jurisdiction of 636 (b) (1) et seq., and that when the petitioner refused to sign the second consent prevented the Magistrate to continue Jurisdiction because 636 (b) (1) et seq., does not express trial as being part of the duties contained therein. (see; Appendix A. at page; 4563). Therefor should have had a trial before the Judicial Officer District Court Judge. <sup>2/</sup>

d. The petitioner was entitled to free transcripts because he claimed that the Magistrates findings were clearly erroneous and therefor should have been allowed to present his claim meaningfully. Because of this denial the Court of appeals later rejected the petitioners claim on appeal that the Correctional Officers planted a knife in his cell as a pretext to remove him claiming that the challenge is without substance. Obviously no substance is acquired when denied material i.e. transcript so to substantiate it. (see; Appendix A. at page; 4570 at [5] Fact-Finding.)

CONCLUSION

For the forgoing reasons the petitioner John J. McCarthy #38051-066 (state no; 14163) respectfully requests that a writ of certiorari issue to review the Judgment of the Appeals Court affirming the District Court action.

Dated; August, 2 1990

RESPECTFULLY SUBMITTED

*John J. McCarthy*  
JOHN J. McCARTHY #38051-066  
State No; 14163  
UNITED STATES PENITENTIARY  
P.O. BOX 1000  
LEAVENWORTH KANSAS., 66048-1000

Note; 1/

At the 1985 hearing the petitioner was represented by counsel soon after counsel withdrew and the petitioner proceeded pro se. The reason his counsel withdrew was because the petitioner filed a grievance against him. One of the issues raised in the grievance was his counsel failing to pursue the case meaningfully and failing also to raise issues i.e. Jury Demand.

2/ The appellate Court does concede it was a trial.